

# Fair Innings: Equality and Children's Healthcare

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## What is fair innings?

**Fair innings** refers to the theory that healthcare resources should be allocated in a manner that aims to allow each individual their "fair innings", an average number of years lived in good health.<sup>1</sup>

## When should fair innings apply?

- Some argue that fair innings should only apply in extreme circumstances, such as life-saving treatment
- Others suggest age weighting can serve as a mechanism for equalization in the healthcare system more broadly<sup>2</sup>

## Why fair innings?

Fair innings draws primarily on **equity** based arguments

- Accepting that **justice or fairness** can be applied to quantities of life, prioritizing individuals based on age can be morally justified on the ground that those who experience fewer years of life are worse off<sup>3</sup>



## Section 15 of the Charter

### Section 15(1) provides ...

"Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"

### State action is discriminatory if...

1. It creates a **distinction** based on an **enumerated** or **analogous ground**, and
2. It perpetuates **arbitrary disadvantage**<sup>4</sup>



### Section 15(2) provides ...

Section 15(1) "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups..."

### State action is ameliorative if...

1. The program or activity has an **ameliorative purpose** targeted at a disadvantaged group<sup>5</sup>
2. The distinction drawn by the law serves and is necessary to that purpose<sup>6</sup>

## What can the Charter teach us about fair innings?

- There is **no right to healthcare** in Canada. The government is free to create a targeted healthcare scheme under a fair innings framework, so long as it does not discriminate in the provision of that service.
- While fair innings appears to be discriminatory on its face, age often corresponds to an individual's particular circumstances and capacities. A fair innings approach to children's health might not meet the standard of **arbitrary disadvantage** laid out by the Supreme Court in *Taypotat*.
- Ameliorative action focuses on **purpose, not effect**. While there may be debate as to the ultimate effect of a fair innings approach to children's healthcare, the purpose of the program falls within the scope of the ameliorative action provision

### References

<sup>1</sup> Farrant, A. 2009. "The Fair Innings Approach and Increasing Life Spans" *Journal of Medical Ethics* 35(1): 53-59 at 53.

<sup>2</sup> Bognar, G. 2008. "Age Weighting" *Economics and Philosophy* 24(2): 167-189.

<sup>3</sup> Ross, L et al. 2012. "Equal Opportunity Supplemented by Fair Innings: Equity and Efficiency in Allocating Deceased Donor Kidneys" *American Journal of Transplantation* 12: 2115-2124 at 2118.

<sup>4</sup> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20, [2015] 2 SCR.

<sup>5</sup> *R v Kapp*, 2008 SCC 41 at paras 22, 24, [2008] 2 SCR.

<sup>6</sup> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 45, [2011] 2 SCR 670.